The case just cited was decided in 1944. We turn now to a yet later case where the items seized by the officers, arresting without warrant, and later admitted in evidence, were a sport shirt, a pair of trousers, a partly filled bottle of whiskey, and a newspaper. The court said:

> "Appellant properly conceded that an officer making a lawful arrest on a criminal charge may take such articles as may reasonably be used as evidence; * * *."
>
> Morton v. United States, 147 Fed. (2d) 28, 30.

Another case from the federal courts contains the following comment:

> "A police officer may arrest without warrant persons believed by the officer upon reasonable cause to have been guilty of a felony. * * * Contemporaneous with the arrest and as an incident thereto, they had the right to seize the things used in connection with the commission of the crime."
>
> United States v. Stein, 53 Fed. Supp. 911, 913.

In the case last cited, the defendant sought, by motion, to obtain an order "directing the return to the defendants of all memoranda, including slips, receipts and papers taken from the defendants by customs agents, secret service agents and city detectives and all other evidence which was taken from the persons of said defendants at the time of their arrest and for an order directing the United States Attorney to destroy all evidence which cannot be returned and for an order suppressing the use of the same upon the trial." (Id., page 911). The motion was "denied in all respects."

This rule, then, is so well established that the citation of cumulative authorities would serve no good purpose. We respectfully submit that it cannot be successfully denied that the officers, with reasonable cause to believe a felony had been committed by the defendant Wolf, had the right to arrest him, even though no warrant for arrest had been issued. Incident to such arrest, they had the further right to seize such material evidence as they found in the immediate vicinity of the place of arrest. Neither such arrest nor seizure we submit were in violation of the constitutional rights of the accused.

At the trial, the district attorney took the position that, even if there had been an unlawful seizure, the evidence was, nevertheless, admissible under the rule of law adopted in Colorado and announced in Massantonio v. People, 77 Colo. 392, 236 Pac. 1019. However that may be, we are thoroughly convinced that the rule need not be here invoked, for the very obvious reason that here there was no unlawful arrest or unreasonable search or seizure such as is prohibited either by the state or federal constitutions.

The defendants, as we read their briefs, rely primarily upon three cases. These authorities are:

United States v. Lefkowitz, 52 S. Ct. 420, 285 U. S. 452.
People v. Martin, 382 Ill. 192, 46 N. E. (2d) 997.
People v. Schmoll, 383 Ill. 280, 48 N. E. (2d) 933.

While other authorities are cited, these are the principal decisions which, it is contended, sustain the position of the defendants. Let us examine them more closely.

First, we direct our attention to United States v. Lefkowitz, supra. The Supreme Court of the United States there affirmed an order of the United States Circuit Court of Appeals, and it is to the report of the Circuit Court that we now turn for a more complete statement of the factual situation that existed in that case. It appears that the two petitioners were arrested by a deputy United States marshal in execution of a John Doe warrant. The arrests were treated as having been made lawfully. Continuing, the court said:

> "Contemporaneously with the arrests, both rooms were thoroughly searched. Two desks were opened, ransacked, and papers they contained seized; a towel cabinet was searched and papers in it seized; waste paper baskets were emptied and scraps of paper taken from them and later pasted together. All that was seized after this search was delivered to the United States attorney, who now has possession of so much thereof as he has not seen fit to return."
>
> Lefkowitz v. U. S. etc., 52 Fed. (2d) 52, 53.

In addition to the evidence so seized, the officers took certain items from the person of Lefkowitz himself. Said the court:

"Without confusing a search for and seizure of contraband of which the government is entitled to take possession because of what in law is said to be the inherent guilt of the res itself and the search for and seizure of books, papers, documents and the like which are not, at least as yet, considered guilty themselves, but are only wanted to prove the guilt of persons or property, it is needless to emphasize that searches and seizures of both kinds must always be reasonable to be lawful. Whenever evidence is searched for and seized, it must be in connection with something else which gives to the public a paramount interest in it. * * * Consequently, when a seizure of contraband is defended as an incident of a lawful arrest, as in United States v. 1013 Crates, etc., supra, or a seizure of evidence is defended on the same ground, as in this case, the reasonableness of the search which resulted in the seizure is the test of legality in each instance.

"The application of this principle to the present case results at once in dividing the property seized into two classes—that which was taken from the person of petitioner Lefkowitz when he was arrested and searched; and that which was seized when the office and its furniture were explored for evidence.

"The things that were found on Lefkowitz were lawfully seized and may be used against him. Agnello v. United States, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409; Marron v. United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231; United States v. Kirschenblatt, (C. C. A.) 16 F. (2d) 202; 51 A. L. R. 416. The law on this subject has long been so well settled that it is useless to do more than state it whenever occasion arises. It is difficult to conceive how the facts in one case can make it differ from others in this respect, and such a search properly

conducted is reasonable as a matter of law." (Id., pages 52, 53, 54.)

The court then directed its attention to the evidence seized when the offices were *searched*, a procedure the court held to be unlawful, particularly noting, however, that

> "Such a search and seizure as these officers indulged themselves in is not like that in Marron v. United States, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231, where things openly displayed to view were picked up by the officers and taken away at the time an arrest was made." (Id., page 54.)

Applying these principles to the case at bar, there is nothing whatever in the instant record to indicate a search of any kind. It is our position, as previously stated, that the defendant was lawfully arrested without warrant by the officers who had reasonable grounds to believe him guilty of a felony. His offices were not searched. But the day books, lying on the table in open sight, were certainly so directly under his control that it was permissible for the officers, making a lawful arrest, to take them as an incident of the arrest.

The U. S. Supreme Court, commenting on its earlier decision in the Marron case, supra, said:

> "These searches and seizures are to be distinguished from the seizure of a ledger and some bills that was sustained in the Marron case. * * * The ledger and bills being in plain view were picked up by the officers as an incident of the arrest. No search for them was made. The ledger was held to be part of the outfit actually used to commit the offense."
>
> U. S. v. Lefkowitz, 52 S. Ct. 420, 423.

This case, then, not only fails to offer any solace to these defendants, but, on the contrary, it conclusively establishes the validity of the action of the arresting officer, and those assisting him, in picking up and retaining, as an incident of the arrest, the day books in plain view at the time of the arrest. This, we submit, was not an unreasonable search and seizure, nor, indeed, was it a search in any sense of the word.

In People v. Martin, 382 Ill. 192, 46 N. E. (2d) 997, the officers arrested the defendant Martin on February 7, 1941, and "in making the arrest the records and envelopes identified in evidence were *discovered* and turned over to the office of the States Attorney" (Id. 999). This, we submit, clearly indicates a search and seizure unlawful in itself, and obviously quite different from the action of the deputy district attorney in the case at bar, who, we again repeat, merely picked up a day book in plain view, without indulging in a *search* of any kind.

In People v. Schmoll, 383 Ill. 280, 48 N. E. (2d) 933, the defendant gave the officers permission to look at a particular record in his files. Thereafter, without his permission, and while the defendant was held in custody, having been previously arrested, the officers, without a search warrant, searched his offices and seized all of his records. This, we agree with the Illinois court, was unlawful and unconstitutional. The case, however, is no authority here because the facts of the case at bar are so essentially different from those in any of the cases cited by the defendant, that the instant case comes under the rule of law, universally recognized, permitting an arrest without warrant if the arresting officer has reasonable grounds to believe the accused guilty of a felony, and the seizure of items of evidence on his person or under his immediate control as an incident of the arrest. This case does not come under the rule of law announced by the cases cited in support of the contention of these defendants. This we submit as a fact to be determined by the court.

Likewise, as we have heretofore pointed out, it is not a mere seizure, or even a search and seizure of evidence that is prohibited by the state and federal constitutions. These venerable documents forbid only *unreasonable* searches and seizures.

> "Neither the Federal Constitution nor the State Constitution forbids a search and seizure without a warrant. Those instruments forbid unreasonable searches and seizures. The question is not whether the officer had a search warrant; it is whether the

search and seizure were unreasonable. United States v. McBride, D. C., 287 F. 214, 216."

Hubin v. State, (Md. 1942), 23 Atl. (2d) 706, 710.

Summing up our position at this point, then, we reiterate that the defendant Wolf was lawfully arrested without warrant because the officers had reasonable grounds to believe that he had committed a felony. This belief was based upon the fact of their actual knowledge of the physical condition of Gertrude Martin, the discovery of this young woman in the same hotel where the doctor maintained his residence, the same not being the residence of the girl, and her uncontradicted statement that the defendant had performed an abortion upon her. Armed with this knowledge, the officers made a lawful arrest, and a lawful seizure of evidence in plain sight at the time. There was no *search*, and certainly no *unreasonable* search and seizure such as is prohibited by the constitution.

If, however, for the sake of argument, we now concede that the evidence in question was illegally seized, still the defendant cannot be heard to complain. It is true that there is apparently an irreconcilable conflict among the decisions of the courts of last resort of the several states pertaining to the admission of evidence illegally obtained. Colorado, by the decisions of its highest court, is committed to the doctrine that the manner in which evidence is obtained, whether legal or illegal, does not affect its admissibility. This rule was established in the now famous case of Massantonio v. People, 77 Colo. 392, 236 Pac. 1019. The rule was affirmed in the later case of Roberts v. People, 78 Colo. 555, 243 Pac. 544. There, at page 559, the court said:

"'4. Since the supersedeas was granted in the instant case we have established, as the rule in this jurisdiction, that the admissibility of evidence is not affected by the fact that it has been unlawfully seized. Massantonio v. People, 77 Colo. 392, 236 Pac. 1019.'"

"That conclusion was reached after a thorough examination of all the available authorities and a

careful consideration of the alleged reasons supporting each. We reaffirm it. It is now urged, however, that one of the reasons there given must fail in this jurisdiction because section 3726, C. L. 1921, exempts an officer from liability for any unlawful act committed while engaged in good faith in the enforcement of the prohibition law. The validity of that act, when urged in defense of one who invades the sanctity of another's domicile in violation of the Constitution, must be determined when properly before us. It is not so here. If, under such circumstances, the act would be a complete defense, it must be because the legislature was empowered to adopt it, and if so its existence would affect in no way the rule laid down in the Massantonio case nor the reasons supporting it. There is ample authority, as therein set forth, for that decision, but it does not rest primarily upon authority, but upon reason. If the application of the rule were divorced from popular prejudice concerning the manufacture and sale of intoxicating liquor, and violations of law by corporations, proof of which depends upon records unlawfully seized, we think the unanimous verdict of lawyer and layman would support the rule of admissibility. Let it be announced, for instance, that one unquestionably guilty of an atrocious murder had been turned loose because it developed that the weapon with which the crime was committed and the blood soaked clothes of the victim, offered in evidence, and without which conviction could not be obtained, had been excluded because some rule of law had not been complied with in their seizure, and a shudder would run through the commonwealth, and its citizens, with one voice, would condemn the helplessness of its court against the depredations of outlaws.

"The argument that the rule announced in the Massantonio case leaves the citizens unprotected against one who unlawfully and violently enters his dwelling if the wrongdoer is unable to respond in damages, should be addressed to the legislature not

the courts, and apparently overlooks the fact that such an entry was a criminal trespass and indictable at common law (19 Cyc. 1113, 1117), and that the common law has been adopted in Colorado."

Colorado is not alone in thus interpreting the law. Following earlier decisions of the state appellate court, the Court of General Sessions of New York County in 1939 approved the rule that

> "The court will not take notice of how they (papers or other articles of personal property) were obtained—whether lawfully or unlawfully—nor will it frame issues to determine that question."
>
> People v. Kuhn, 15 N. Y. S. (2d) 1005, 1007.

In Maryland, although now governed by specific statutory provisions, the like of which we do not have in Colorado, the Court of Appeals announced the law, in a well worded decision, as follows:

> "Prior to the enactment of the Bouse Act in 1929, Maryland followed the ancient rule of the common law that evidence is not rendered inadmissible by the fact that it was procured by unlawful search and seizure. Meisinger v. State, 155 Md. 195, 141 A. 536, 142 A. 190. The Supreme Court of California explained the reason for the rule in the following language: 'From the necessities of the case the law countenances many devious methods of procuring evidence in criminal cases.' The whole system of espionage rests largely upon deceiving and trapping the wrongdoer into some involuntary disclosure of his crime. 'It dissimulates a way into his confidence; it listens at the keyhole and peers through the transomlight.' 'It is not nice, but it is necessary in ferreting out the crimes against society which are always done in darkness and concealment.' People v. Mayen, 188 Cal. 237, 205 P. 435, 440, 24 A. L. R. 1383. * * * Unquestionably it is within the established power of the State to prescribe the evidence which may be received in the courts of its own government."
>
> Hubin v. State, (Md.) 23 Atl. (2d) 706, 708.

In 1938, the Supreme Court of North Carolina said:

"Under the common law, with few exceptions, such as involuntary confessions, evidence otherwise competent is admissible irrespective of the manner in which it was obtained by the witness. The Courts look to the competency of the evidence, not to the manner in which it was acquired. This rule has long been followed in the Courts of North Carolina. State v. Graham, 74 N. C. 646, 21 Am. Rep. 493; State v. Mallett, 125 N. C. 718, 725, 34 S. E. 651 (affirmed by the United States Supreme Court on writ of error in Mallett v. North Carolina, 181 U. S. 589, 21 S. Ct. 730, 45 L. Ed. 1015); State v. Thompson, 161 N. C. 238, 76 S. E. 249; State v. Wallace, 162 N. C. 622, 623, 78 S. E. 1; Ann. Cas. 1915B, 423; State v. Neville, 175 N. C. 731, 95 S. E. 55; State v. Godette, 188 N. C. 497, 125 S. E. 24; State v. Hickey, 198 N. C. 45, 150 S. E. 615. The rule is stated in 1 Greenleaf Ev., sec. 254a, as follows: 'It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question.'"

State v. McGee, 214 N. C. 184, 198 S. E. 616, 617.

This decision was further approved by the same court in 1940 in the case of State v. Sherner, 216 N. C. 719, 6 S. E. (2d) 529, 530.

A well worded decision further recognizing the right of each state to fix the rules of evidence within its jurisdiction is as follows:

"* * * appellant insists that there must be removed from the evidence above discussed all testimony given by the two officers, for the reason that

they entered the apartment without a search warrant. Continuing his theory at this juncture, appellant complains that such actions on the part of these officers amounted to and were an infringement of his constitutional rights. More particularly, it is his claim that the trial court's reception of the evidence thus obtained violates the Fourth and Fourteenth Amendments to the United States Constitution, and sections 8 and 9, art. 1, of the Iowa Constitution. Further appellant urges that the federal prohibitory law does not permit the use of evidence obtained by a search and seizure without a valid search warrant, and cites Peru v. United States (C. C. A.) 4 F. (2d) 880.

"But the indictment in the case at bar is not based upon the laws of the United States. Said instrument was founded upon the state laws against trafficking in intoxicating liquors. So the state rule, as distinguished from the federal doctrine, must govern. Previously this court was required, at different times, to pass upon the question relating to the admissibility of evidence obtained in the manner and way here employed. Upon those occasions it was held that such evidence could be properly received. State v. Lambertti, 204 Iowa 670, 215 N. W. 752; State v. Gorman, 196 Iowa 237, 194 N. W. 225; Joyner v. Utterback, 196 Iowa 1040, 195 N. W. 594; State v. Rowley, 197 Iowa 977, 195 N. W. 881; Lucia v. Utterback, 197 Iowa 1181, 198 N. W. 628; State v. Parenti, 200 Iowa 333, 202 N. W. 77; State v. Wenks, 200 Iowa 669, 202 N. W. 753. Apt language in the Lambertti case is:

"'Prior to the time of the trial, the defendant filed a motion to suppress all of the evidence obtained by the search of the defendant's premises under the search warrant, on the ground that said search warrant was illegally issued, in that the same was in violation of section 8, article 1, of the Constitution of the state of Iowa, * * * and in violation of the Fourth Amendment to the Constitution of the United States, and in violation of the Fifth Amendment to the Con-

stitution of the United States. This motion was by the court overruled.

"'Objections were made to all of the foregoing evidence at the time of the trial, for the reasons urged in the "motion to suppress," and the objections were by the court overruled. These rulings by the court are assigned as error. In State v. Tomm, 195 Iowa 91 (191 N. W. 530), we held that evidence which is pertinent and relevant is admissible against the defendant in a prosecution for crime, even though the same was secured by an unlawful search of defendant's premises, and have universally so held in the subsequent cases. * * *'

"Reluctantly, there was no error permitting the introduction of such testimony."

State v. Bamsey, (Iowa) 223 N. W. 873, 874.

In a very recent decision by the Federal Circuit Court of Appeals (Tenth Circuit), the court said:

"When the officers got to his room, they took possession of two suitcases belonging to him. They opened them and examined their contents. These contents were offered and received in evidence over the objections of appellant. This evidence was of such a nature that it no doubt was considered by the jury and tended to influence its verdict. Admittedly the officers had no search warrant at the time they seized these suitcases and took possession of these exhibits.

"Even if we assume that the search was illegal, the evidence was nevertheless admissible. It is well settled that evidence obtained by State officers through an unreasonable or illegal search may nevertheless be used by the Federal government in a criminal case instituted in the Federal courts. Under this well settled principle, this evidence was clearly admissible."

Ruhl v. United States, (1945) 148 Fed. (2d) 173, 174.

We also call attention to the following pronouncement, made in 1944, quoting from an earlier California case:

"There is no rule better established or more universally recognized by the courts than that where competent evidence is produced on a trial the courts will not stop to inquire or investigate the source from whence it comes or the means by which it was obtained.'"

People v. Onofrio, (Cal.) 151 Pac. (2d) 158, 160. Continuing, the court said:

"This reason in the Mayen case found approval in the recent case of People v. Gonzales, 1942, 20 Cal. (2d) 165, 124 P. (2d) 44, 47, where it is cited with other cases and where the court also passed adversely upon the same contention that is made in the instant case, namely, that 'the prohibition in the Fourth Amendment of unreasonable searches and seizures is included in the provision of the Fourteenth Amendment that no state shall deprive any person of life, liberty, or property without due process of law, and therefore that under the interpretation given to the Fourth Amendment by the federal courts the introduction of evidence obtained by an illegal search and seizure constitutes a denial of due process of law.' The court points out that 'A criminal trial does not constitute a denial of due process of law so long as it is fair and impartial,' and 'The use of evidence obtained through an illegal search and seizure does not violate due process of law for it does not affect the fairness or impartiality of the trial. (Cases cited.) The fact that an officer acted improperly in obtaining evidence presented at the trial in no way precludes the court from rendering a fair and impartial judgment.' A writ of certiorari was denied by the Supreme Court of the United States in the Gonzales case, 317 U. S. 657, 63 S. Ct. 55, 87 L. Ed. 528." (Id. 160.)

The ruling was affirmed in People v. Peak, (Cal.) 153 Pac. (2d) 464, where at page 469 the court, recognizing "that various jurisdictions are not entirely in harmony with the above stated principles that redress for wrongful possession is not the exclusion of pertinent evidence", concludes that,

in that state, it is necessary to "turn to California decisions which must be accepted as the guide post directing the rule to follow."

So, in Colorado, the trial courts would indeed be subject to just criticism if they failed to look to the previous announcements of the Supreme Court of the state "as guide posts directing the rule to follow" in this jusrisdiction. That rule is unmistakingly set forth in Massantonio v. People, supra, and Roberts v. People, supra. So surely is this true that we deem it unnecessary to comment further on the point.

The situation, then, is plain that there does exist a so-called "federal rule" of evidence applicable in federal courts, which rule has been followed by some state courts. Other states, including Colorado, have followed the common law rule, as certainly we are bound to do until such time as the legislature of the state enacts an appropriate statute or statutes abrogating or modifying the common law.

Summing up our argument on this point, it is our sincere contention that there was no illegal search and seizure in the instant case, because the arrest, even though made without warrant, was nevertheless based upon a reasonable belief by the officers that the accused was guilty of a felony and was, therefore, lawful. No *search* of any kind was made, but evidence, in plain sight of the arresting officers, was taken and subsequently utilized. This was not an *unreasonable search and seizure* such as is prohibited by our organic law. Furthermore, if there was an illegal search and seizure of evidence, competent in itself, such evidence was admissible under the decisions of the Supreme Court of Colorado, and the trial judge was bound to follow the rules of law so announced for this jurisdiction. Such announcement was, and is, based upon an unquestioned interpretation of the common law, which, until modified by appropriate legislative action, remains the law in this jurisdiction.

CONCLUSION.

The first, and indeed the only question seriously argued by counsel, is that the evidence of the People was obtained in violation of the constitutional privileges of the defendants, and hence should have been suppressed. We have

demonstrated that their position is not well taken, and that the People did not obtain the evidence by illegal means. Even, however, if such had been the case, the evidence, otherwise competent, was admissible for the purpose of proving the commission of the crime, and this has, for long years, been the established law in Colorado. That a different rule may obtain in other states, offers no solace to these defendants who selected Colorado as the situs of their crime, and who therefore must abide by the rules of law announced by the Colorado Supreme Court for this jurisdiction.

We respectfully submit that the application for certiorari should be forthwith denied.

Respectfully submitted,

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